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PROCEEDINGS AND ORDERS

DATE: [10/11/89]

CASE NBR: [88107503] CFY

STATUS: [ ]

SHORT TITLE: [Taylor, Carlos A.]
VERSUS [United States]

DATE DOCKETED: [061289]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jun 12 1989		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 10 1989		Order extending time to file response to petition until August 14, 1989.
Aug 14 1989		Brief of respondent United States in opposition filed.
Aug 17 1989		DISTRIBUTED. September 25, 1989
Sep 29 1989		REDISTRIBUTED. October 6, 1989
Oct 10 1989		Petition DENIED. Opinion by Justice Stevens respecting the denial of the petition for a writ of certiorari. (Detached opinion.)

****

88-7503
NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CARLOS A. TAYLOR,

Petitioner,

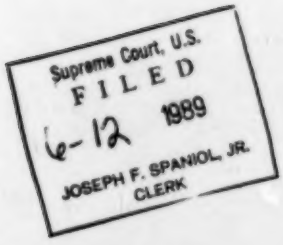
v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI



Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
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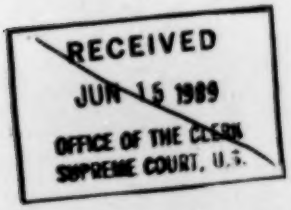

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QUESTION PRESENTED

WHETHER IT IS A VIOLATION OF THE STATUTORY DIRECTIVE UNDER 18 U.S.C. § 3553(a)(4), (5), FOR A DISTRICT COURT TO DISREGARD THE SENTENCING GUIDELINES BASED UPON A FINDING THAT A DEFENDANT'S CRIMINAL HISTORY SCORE INADEQUATELY ACCOUNTS FOR HIS PAST CONDUCT, WHEN THE DISTRICT COURT COULD HAVE CONSIDERED INCREASING THE CRIMINAL HISTORY CATEGORY BY ONE OR MORE LEVELS TO ADJUST FOR THE SITUATION.

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1. United States of America.
2. Carlos A. Taylor.

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PRAYER

The Petitioner, CARLOS A. TAYLOR, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued April 12, 1989.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 88-6158, United States v. Carlos A. Taylor, is attached as appendix A.

On April 12, 1989, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case.

JURISDICTION

On April 12, 1989, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

U. S. Const. amend. V.

Subsections (a)(4) and (a)(5) of Section 3553, Title 18, United States Code, state in pertinent part:

> (a)...The court, in determining the particular sentence to be imposed, shall consider --
>
> ...
>
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced... .

18 U.S.C. § 3553(a)(4),(5).

Section 4A1.3 of the Sentencing Guidelines states in pertinent part:

> If ... the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct ..., the court may consider imposing a sentence departing from the otherwise applicable guideline range ... .
>
> ...
>
> A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes ... .
>
> ...
>
> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a

> Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure.

STATEMENT OF THE CASE

Course of Proceedings

The petitioner, CARLOS A. TAYLOR, pleaded guilty on September 23, 1988, to one count of forcibly impeding a United States Customs Officer, in violation of 18 U.S.C. § 111. Pursuant to a plea agreement, the government dismissed the three other counts in the indictment. On November 11, 1988, the district court, over objection of defense counsel, departed upward from the imprisonment range dictated by the Sentencing Guidelines and sentenced Mr. Taylor to custody of the Attorney General for eighteen months and also imposed a term of one-year supervised release and a fifty dollar special assessment. The Court of Appeals for the Fifth Circuit affirmed Mr. Taylor's sentence on April 12, 1989.

STATEMENT OF FACTS

On August 14, 1988, Mr. Taylor entered the United States from Mexico at Brownsville, Texas. After a United States Customs Officer directed his vehicle to secondary inspection, a dog belonging to the Customs Service alerted on Mr. Taylor's vehicle. Mr. Taylor attempted to flee on foot back to Mexico, and in the process, knocked down a Customs Officer who was trying to stop him.

On August 24, 1988, Mr. Taylor was charged in a four-count indictment with two counts of forcibly impeding a United States

Customs Officer, in violation of 18 U.S.C. § 111, one count of importing approximately 15.5 grams of marijuana, in violation of 21 U.S.C. §§ 952(a), 960(b)(4), and one count of possessing approximately 15.5 grams of marijuana, in violation of 21 U.S.C. § 844(a). On September 23, 1988, Mr. Taylor pleaded guilty to one count of forcibly impeding a United States Customs Officer, in exchange for the government's agreement to dismiss the other three counts.

Prior to sentencing, a United States Probation Officer prepared a presentence report. The report found that Mr. Taylor's offense was a minor assault and, pursuant to section 2A2.3 of the Sentencing Guidelines, determined that the base offense level for the offense was 6. Under section 3C1.1 of the Sentencing Guidelines, the report added 2 points to the offense level for obstruction of justice, in light of Mr. Taylor's attempt to flee, but it also subtracted 2 points from the offense level, under section 3E1.1(a), for Mr. Taylor's acceptance of responsibility. Thus, the report found Mr. Taylor's total offense level to be 6.

Based on Mr. Taylor's prior criminal record, the presentence report further found that his criminal history score totalled 4 points, placing him in criminal history category III. Based on a total offense level of 6 and a criminal history category of III, the report concluded that the guideline imprisonment range for Mr. Taylor's offense was 2 to 8 months.

On November 11, 1988, the district court departed from the guideline imprisonment range and sentenced Mr. Taylor to eighteen months in the custody of the Attorney General and also imposed a term of one-year supervised release to follow imprisonment and a fifty dollar special assessment. Upon objection to the sentence by defense counsel, the district court stated that it was departing upward in sentencing Mr. Taylor because of his prior convictions and his general

demeanor and conduct, and because it did not "agree with the guidelines because of their prior involvement in giving the points." The sentence of eighteen months imposed by the district court was the maximum sentence allowed for under criminal history category VI, the highest criminal history category, with a total offense level of 6. In departing upward, the court gave no consideration to the guideline imprisonment ranges dictated by intermediate criminal history categories IV and V, but instead sentenced Mr. Taylor to eighteen months incarceration because of its disagreement with the guidelines' method of calculating the criminal history score.

On April 12, 1989, the court of appeals affirmed the sentence, finding that the district court had properly applied the guidelines.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States alleging a violation of Section 111, Title 18, United States Code.

REASONS FOR GRANTING THE WRIT

THE ERRONEOUS APPLICATION OF THE SENTENCING GUIDELINES PRESENTS A SIGNIFICANT ISSUE OF THE PROPER APPLICATION OF FEDERAL LAW.

In departing upward, the district court completely disregarded the express dictates of the Sentencing Guidelines and thus violated the statutory directive of 18 U.S.C. §3553(a)(4), (5). The court of appeals also disregarded the statutory directive in affirming the sentence in this case. As a subsequent Fifth Circuit opinion recognizes, the precise issue presented in this case is "a significant question concerning the appropriatenss of a departure from the Guidelines." United States v. Lopez, 871 F.2d 513, 514 (5th Cir. 1989). In fact, the Lopez opinion, which addressed the same misapplication of the Guidelines presented here, demonstrates that the district court and the court of appeals misapplied the Guidelines in Mr. Taylor's case. This Court, therefore, should issue a writ of certiorari to address and clarify the correct application of the Sentencing Guidelines provisions involved in this case.

Subsections (a)(4) and (a)(5) of section 3553, Title 18, United States Code, require the district court, in considering the sentence to be imposed, to consider:

> (4) the kinds of sentences and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission ...; [and]
>
> (5) any pertinent policy statement issued by the Sentencing Commission ... .

18 U.S.C. § 3553(a)(4), (5).

Section 4A1.1 requires the assignment of certain points to a defendant in order to calculate his criminal history score and criminal history category. See Sentencing Guidelines § 4A1.1. Section 4A1.3, however, recognizes that the criminal history category might not "adequately reflect the

defendant's past criminal conduct" and allows the court "to consider imposing a sentence departing from the otherwise applicable guideline range." Id. § 4A1.3. Under this provision, a departure "is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." Id.

The Guidelines make clear that, in departing upward on this basis, the sentencing court cannot completely disregard the Guidelines:

> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher ... criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure.

Id.

In the Lopez opinion, which the Fifth Circuit issued subsequent to its opinion in this case, the court addressed the same issue presented here, but vacated the sentence in that case and remanded for resentencing. See Lopez, 871 F.2d at 514-15. In Lopez, the district court had departed upward from the guideline imprisonment range of four to ten months and had sentenced the defendant to a term of imprisonment for two years. The district court had justified the departure on the ground that the defendant's criminal history category of I "under represented defendant's past criminal behavior and her likely recidivism." Id. at 514.

In vacating the defendant's sentence, the Fifth Circuit concluded that the district court "should not have completely disregarded the Guidelines without further explanation." Id.

at 515. The court further explained the proper procedure for departing upward on the basis that the defendant's criminal history category underrepresents the seriousness of the defendant's criminal history:

> Under section 4A1.3, the judge should have considered the sentencing ranges that would be indicated by raising the defendant's criminal history category to II or higher ... . The two-year departure sentence imposed is the maximum shown for criminal history category V (the second highest criminal history category). Apparently, there was no consideration of the possible sentences using categories II-IV to adjust for the defendant's criminal history ... .
>
> ... The Guidelines require sentencing courts first to consider upward adjustments of the criminal history category, where a defendant's score appears inadequately to reflect his or her history, before a departure sentence may be justified on this basis. Where this is not done, resentencing is appropriate.

Id. (footnote omitted.) Since it issued the Lopez opinion, the Fifth Circuit has reiterated that district courts must follow the procedures set out in Lopez when they depart upward based upon the defendant's criminal history. See United States v. Burch, No. 88-2680, slip op. at 3724 (5th Cir. May 10, 1989).

Because the district court in Mr. Taylor's case failed to follow the dictates of section 4A1.3 of the Sentencing Guidelines, it violated the statutory directives of subsections (a)(4) and (a)(5) of 18 U.S.C. § 3553. The procedurally improper imposition of sentence upon Mr. Taylor also violated his constitutional right to due process of law. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980). As section 4A1.3 of the Sentencing Guidelines and Lopez demonstrate, therefore, this case presents a significant issue of the proper application of federal law that warrants the issuance of a Writ of Certiorari and the resentencing of Mr. Taylor.

CONCLUSION

For these reasons the Petitioner respectfully prays that his application for Writ of Certiorari be granted by this Court.

DATE: June 12, 1989

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-6158
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS A. TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(B-CR-88-186)

(April 12, 1989)

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:*

In this case we consider whether the district court adequately justified its departure from the sentencing guidelines.

Because Taylor pled guilty to one count of forcibly impeding a customs officer, the government dropped three other charges

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

against him, including an additional count of impeding a customs officer, a count of possession of less than fifty kilograms of marijuana, and a count of importing less than fifty kilograms of marijuana. The district court sentenced Taylor to eighteen months imprisonment and a one-year term of supervised release.

The presentence investigation report noted that the sentencing guidelines prescribed a term of imprisonment between two and eight months for Taylor's offense, but recommended a sentence of eighteen months because of the seriousness of Taylor's criminal history.

Under the sentencing guidelines, Taylor was assessed criminal history points for his previous conviction on a 1986 weapons charge, and his conviction in 1988 for burglary of a vehicle. No points were assessed for his 1982 conviction for the unauthorized use of a motor vehicle, for which he received a three-year suspended sentence, or for his 1982 conviction for theft, for which he was fined, because both offenses occurred when he was less than eighteen years old (seventeen) and more than five years before the incident giving rise to the federal charge. See Sentencing Guidelines § 4A1.2(d)(2). Taylor also had a state charge of marijuana possession pending at the time of the federal offense.

Sentencing Guideline § 4A1.3 authorizes a departure from the guideline range when "the criminal history category does not

adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." Subparts (a) and (d) of that section allow the sentencing judge, in making such a departure, to take into account reliable information concerning the defendant's prior sentences not used in computing the criminal history category, and whether the defendant was pending trial on another charge at the time of the instant offense.

Taylor asserts that the upward departure from the sentencing guidelines was not justified in his case. He argues, citing 18 U.S.C. § 3553(b), that because the district court did not state reasons for increasing his sentence to eighteen months, the departure was arbitrary.

In this case, the sentencing judge stated that he was departing from the guideline range because he felt that the sentencing guidelines score did not adequately take into consideration Taylor's criminal history: "A look at his prior involvements and his prior convictions and his general demeanor and conduct certainly calls for consideration that does not exist in the guidelines . . . [a]nd for that reason I am departing from the guidelines." The statements of the district judge indicate that he relied on section 4A1.3 to justify the departure from the guidelines.

In United States v. De Luna-Trujillo, No. 88-2689, slip op. at 2399 (5th Cir. Mar. 6, 1989), we stated that where the district court relies on section 4A1.3 to depart from the guidelines, it should clearly identify its reasons for doing so. See also United States v. Fisher, No. 88-1790, slip op. 2412 (Mar. 7, 1989). In this case, although we cannot say that the district court explicitly set forth its reasons for the upward departure from the guidelines, the meaning of the court's remarks is plainly discernible from a review of the entire record, including the presentence report. The district court was referring to the fact that Taylor's criminal-history score did not accurately reflect his actual criminal history, including his offenses committed as a minor, and the likelihood of his recidivism, which are valid concerns under the guidelines. See Commentary to section 4A1.3. Although we think that the district court could have been more explicit in the light of our instructions in De Luna-Trujillo, we affirm the sentence since the court's intentions are clear to us, from the record as a whole, and because we are convinced that the district court properly applied the guidelines to fashion an appropriate sentence in this case.

The judgment of the district court is therefore

A F F I R M E D.

PROCEEDINGS

NOVEMBER 11, 1988

THE COURT: Cause B-88-186, UNITED STATES OF AMERICA VERSUS CARLOS A. TAYLOR. I am going to set aside the forfeiture. Carlos A. Taylor --

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: Have you had an opportunity to look at your presentence investigation?

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: Is there anything contained therein that is not correct?

DEFENDANT TAYLOR: No, Your Honor.

MR. GAVITO: Have minor one, Judge. There is a reference to his grandfather and father. He calls his grandfather father. He is not trying to deceive anybody about the two.

THE COURT: Are you trying to spend a lot of time in the penitentiary?

DEFENDANT TAYLOR: No, Your Honor.

THE COURT: Well, you read this like I read this. You have got to admit that you do some things that are uncalled for. As a matter of fact, the only reason you got into trouble -- even the prosecutorial version indicates that you weren't violent as such. But this offense was committed in your attempt to evade officers there at the bridge. And in

the process you knocked one of them down or hit one of them. Not with your fist or anything like that. Does that make any sense? Doesn't make any sense, does it, for you to do that?

DEFENDANT TAYLOR: No.

THE COURT: They are going to do their thing. You understand that. And they are going to be protected. You understand that, too.

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: Do you have anything to say to me before I decide what to do in your case?

DEFENDANT TAYLOR: No, sir.

THE COURT: I am going to depart from the guidelines and commit you to the custody of the Attorney General for a period of 18 months. The departure is resultant of the fact that you are -- one looks at your past and one must consider the fact that you must get some counseling or something. Cool it, man.

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: I think you already have two felonies don't you?

DEFENDANT TAYLOR: Yes, sir.

THE COURT: Your attorney will tell you that here in Federal Court we only enhance in general course in matters of narcotics and drugs. But the State Court uses all of these against you. If you ever get into trouble again, they are

going to enhance you as an habitual and your attorney or judge is not going to be able to do anything about it. You understand that?

DEFENDANT TAYLOR: Yes.

THE COURT: I am also going to impose a supervised release term of one year and find that no fine should be imposed against you because of your inability to pay. But I am going to impose an assessment of $50 as required by law.

MR. GAVITO: Will the Court note our exception to the Court departing upward in this case. I have to discuss it with him to see what --

THE COURT: I want the record to show that I am departing because of the fact that -- although the particulars in this incident for which he was convicted by his plea of guilty are not aggravating; that a look at his prior involvements and his prior convictions and his general demeanor and conduct certainly call for consideration that does not exist in the guidelines by which he needs to comform his conduct to abide by law. And for that reason I am departing from the guidelines.

MR. GAVITO: And our objection goes to the issue, Judge, of the --

THE COURT: The eight months to eighteen months.

MR. GAVITO: From two to eight according to the guidelines. And the guidelines did take those prior

convictions into account in assessing higher points to arrive at Category 3.

THE COURT: I understand. I understand.

MR. GAVITO: Very well.

THE COURT: I don't agree with the guidelines because of their assessment of prior involvement in giving the points. By that standard, for example, a person could have ten convictions and they only give two or three points. I don't agree with that. You have got to look at each case separately.

I am going to recommend that he receive counseling during the period of his confinement.

Have you discussed his right of appeal with him?

MR. GAVITO: Yes, sir.

(Proceedings adjourned.)

IN THE UNITED STATES DISTRICT COURT:

FOR THE SOUTHERN DISTRICT OF TEXAS:

I, WILLIAM G. HOLLOWAY, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Wm Holloway — 1-26-89

WILLIAM G. HOLLOWAY
OFFICIAL COURT REPORTER

DATE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Esperanza LOPEZ,
Defendant-Appellant.

No. 88-2962
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 14, 1989.

Defendant pled guilty to multiple counts of violating federal immigration laws in the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., and she appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) finding that criminal history score did not adequately reflect defendant's criminal history was not clearly erroneous, but (2) sentencing judge could not merely disregard guidelines based on finding that criminal history score underrepresented defendant's past conduct and propensity to commit future crime, when he should have considered increasing criminal history category by one or more levels to adjust for situation.

Vacated and remanded.

1. Criminal Law ⇐986.2(4)

Finding that lowest possible criminal history score did not adequately reflect defendant's criminal history was not clearly erroneous; defendant had been twice convicted for conspiracy to import aliens barely outside the ten-year limit for calculating the criminal history score. Sentencing Guidelines, §§ 4A1.2(e)(2), 4A1.3.

2. Criminal Law ⇐986.2(4), 1208.1(3)

Sentencing judge who believed that criminal history score of zero, although correct, underrepresented defendant's past criminal behavior and likely recidivism, was required to consider sentencing ranges that would be indicated by raising the criminal history score, but could not merely bypass guidelines altogether. Sentencing Guidelines, §§ 4A1.2(e)(2), 4A1.3.

Roland E. Dahlin, II, Federal Public Defender, H. Michael Sokolow, Asst. Federal Public Defender, Houston, Tex., for defendant-appellant.

Paula C. Offenhauser, Asst. U.S. Atty., Henry K. Oncken, U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this Sentencing Guidelines ("Guidelines") case we are confronted with a significant question concerning the appropriateness of departure from the Guidelines. Specifically, we must determine whether it is proper to disregard the Guidelines based upon the finding that a defendant's criminal history score inadequately accounts for her past conduct and propensity to commit future crimes, when the sentencing court instead could have considered increasing the criminal history category by one or more levels to adjust for this situation.

I.

Defendant Esperanza Lopez pleaded guilty to multiple counts of violating the federal immigration laws as part of a plea bargain under which the government promised not to oppose lenient sentencing by the district judge. Despite prior violations of the immigration laws, defendant scored a zero on her criminal history calculation under the Guidelines, because the sentences for those offenses were imposed more than ten years prior to the commencement of the instant offense. *See* Guidelines § 4A1.2(e)(2). This criminal history score of zero points placed the defendant in criminal history category I, the lowest possible category. In combination with her offense level of 9, the defendant's criminal history category indicated a recommended sentencing range of four to ten months. At the sentencing hearing, the district judge stated that although the criminal history calculation was correct, it nonetheless underrepresented defendant's past criminal behavior and her likely recidivism. He accordingly departed from the Guidelines on this explicit basis, imposing a sentence of two years' imprisonment plus two years' supervised probation and a $50 special assessment.

II.

There is no question that a sentencing court may sometimes justify its departure from the Guidelines based upon the inadequacy of a defendant's criminal history score. *United States v. De Luna-Trujillo*, 868 F.2d 122, 124 (5th Cir.1989); *United States v. Fisher*, 868 F.2d 128, 129–30 (5th Cir.1989). However, the Guidelines provisions treating adjustments for criminal history indicate that in considering a departure from the Guidelines,

> the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a category IV criminal history, the court should look to the guideline range specified for a defendant with a category IV criminal history to guide its departure.

Guidelines § 4A1.3.

III.

[1] In this case, we accept, as we should, the district judge's finding that category I does not adequately reflect defen-

dant's criminal history, as that finding is not clearly erroneous and in fact appears entirely correct. *See United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.) (Per Curiam), *on petition for rehearing*, 868 F.2d 807 (5th Cir.1989). The defendant, in 1977, was convicted twice for conspiracy to import aliens. These convictions were barely outside the ten-year limit of section 4A1.2(e)(2). Thus, the district court was justified in considering that a level of zero was not representative of defendant's true criminal history. Nevertheless, we conclude that the court should not have completely disregarded the Guidelines without further explanation.

[2] Under section 4A1.3, the judge should have considered the sentencing ranges that would be indicated by raising defendant's criminal history category to II or higher. Instead, he appears to have bypassed the Guidelines altogether. The two-year departure sentence imposed is the maximum shown for a criminal history category of V (the second highest criminal history category). Apparently, there was no consideration of the possible sentences using categories II–IV to adjust for defendant's criminal history.[1] Nor can we conclude, without further explanation from the district court, that this history was so patently outrageous that any such adjustments would be inadequate.

Under the circumstances, the case must be remanded for resentencing. The Guidelines require sentencing courts first to consider upward adjustments of the criminal history category, where a defendant's score appears inadequately to reflect his or her history, before a departure sentence may be justified on this basis. Where this is not done, resentencing is appropriate.

In so holding, we emphasize that in some cases involving defendants with low criminal history scores, it may be justified to impose a sentence reflecting a much higher criminal history category or to go beyond the range corresponding to the highest category VI. However, in such cases the sentencing judge should state definitively that he or she has considered lesser adjustments of the criminal history category and must provide the reasons why such adjustments are inadequate. Here, we express no view as to the ultimate propriety of the two-year sentence or of any other lesser or greater sentence that may be imposed on resentencing. We remand only to ensure that the appropriate methodology is followed under the Guidelines.

For the above reasons, the sentence is VACATED, and the case is REMANDED for resentencing.

1. We clarify that the two-year sentence was a departure sentence, not one arrived at using a Category V criminal history. Our reference to the fact that this sentence falls into the range

NO. _____ 88-7503

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CARLOS A. TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE
TO PROCEED
IN FORMA PAUPERIS

Petitioner, CARLOS A. TAYLOR, pursuant to Rule 46 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by appointed counsel on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: June 12, 1989

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas

By H. Michael Sokolow
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Supreme Court, U.S.
FILED
6-12 1989
JOSEPH F. SPANIOL, JR.
CLERK

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JUN 15 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

88-7503

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

H. Michael Sokolow, a member of the Bar of this Court, certifies that, pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

The Honorable Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing the envelope in the United States Post Office, Civic Center Station, Houston, Texas 77208, on June 12, 1989, and further certifies that all parties required to be served have been served.

H. Michael Sokolow
H. MICHAEL SOKOLOW

10

ORIGINAL

No. 88-7503

Supreme Court, U.S.
FILED
AUG 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CARLOS A. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

KAREN SKRIVSETH
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the district court properly imposed a sentence above the applicable Sentencing Guideline range because petitioner's criminal history category did not adequately reflect the seriousness of his past criminal conduct.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 88-7503

CARLOS A. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A10-A13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1989. The petition for a writ of certiorari was filed on June 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Texas to one count of forcibly impeding a United States Customs Officer while engaged in and on account of the performance of his duties, in violation of 18 U.S.C. 111. He was sentenced to 18 months' imprisonment, to be followed by a one-year term of supervised release.

1. Petitioner was indicted on August 24, 1988, on two counts of forcibly impeding a United States Customs Officer, in violation of 18 U.S.C. 111; on one count of importing 15.5 grams of marihuana into the United States from Mexico, in violation of 21 U.S.C. 952(a); and on one count of possessing 15.5 grams of

marihuana, in violation of 21 U.S.C. 844(a). 1 R. 16-17. On September 23, in exchange for the government's dismissal of the remaining counts, petitioner pleaded guilty to one count of forcibly impeding a Customs Officer. 1 R. 8, 13; 2 R. 5-6. The factual basis for the plea stated, 2 R. 10-11:

> On August 14, 1988, * * * [petitioner] entered the United States at the Port of Entry at Brownsville. After a negative declaration he was sent over to secondary inspection. When the canine dog alerted on his vehicle, [petitioner] attempted to flee back on foot to Mexico. And in the process he knocked down Joe Silva, a United States Customs Officer, while Mr. Silva was on duty and was trying to stop [petitioner] from running back to Mexico.

2. a. Under 18 U.S.C. 3553(b)(Supp. IV 1986), the sentencing court is required to impose sentence in accordance with the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) (Supp. IV 1986) unless the court "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The applicable guideline range for an offense is determined, first, by calculating the base offense level for the offense under Chapter 2 of the guidelines; second, by making any appropriate adjustments under Chapter 3 for injury to victims of the crime, the defendant's role in the offense, and obstruction of justice; and, third, by determining the applicable criminal history category under Chapter 4. The applicable sentencing guideline range is determined from the Sentencing Table in Chapter 5, Part A, by finding on the grid the point at which the adjusted offense level intersects with the applicable criminal history category.

Sentencing Guideline § 4A1.1 provides that from one to three points are included in the criminal history score for each previous offense committed by the defendant, depending upon the length of any sentence of imprisonment imposed. United States Sentencing Comm'n, Guidelines Manual § 4A1.1(a)-(c) (Oct. 1987) [hereinafter Sentencing Guidelines]. Additional points are added

if the instant offense was committed while the defendant was serving a sentence, or if the instant offense was committed within two years of the defendant's release from a prison term of at least 60 days. § 4A1.1(d), (e). Certain offenses are not included in the calculation, including sentences for adult convictions of a juvenile under 18 years of age at the time of the offense if no prison term was imposed. See Commentary on Sentencing Guideline § 4A1.1(c).

Sentencing Guideline § 4A1.3 permits the sentencing court to depart from the applicable guideline "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes * * *." Under Section 4A1.3, the court may consider such factors as whether the defendant committed the offense while he was awaiting trial, sentencing, or appeal on another charge, and whether the defendant engaged in similar adult criminal conduct that did not result in a conviction.

b. The Probation Office determined that, under the sentencing guidelines, petitioner's total offense level was 6 and his criminal history category was III. The offense level was based on a six-point base offense level under the Minor Assault guideline, Sentencing Guideline § 2A2.3, plus two points under Sentencing Guideline § 3C1.1 for obstruction of justice because of petitioner's attempt to flee, minus two points for acceptance of responsibility under Sentencing Guideline § 3E1.1(a), because petitioner readily acknowledged his involvement in the offense. Pet. 4.

The criminal history score was calculated under Sentencing Guideline § 4A1.1. Section 4A1.1(c) required that petitioner be charged with one point for unlawfully carrying a weapon, for which petitioner received a 30-day jail term, and Sentencing Guideline § 4A1.1(a) required that petitioner be charged with three points for burglary of a vehicle, for which he received a two-year term of imprisonment. Under the Sentencing Table, Ch.

5, at 5.2, a criminal history score of four points places the defendant in Criminal History Category III. The applicable guideline range for a defendant with an offense level of 6 and a Criminal History Category of III is two to eight months' imprisonment.

The records presented to the sentencing court included at least four additional criminal incidents that are not reflected in petitioner's criminal history score under Sentencing Guideline § 4A1.1. First, petitioner was convicted at the age of 17 as an adult for a Class A theft committed on April 27, 1982, and was fined $150. Second, petitioner was convicted at the age of 17 as an adult for the unauthorized use of a motor vehicle on June 30, 1982. He was given a suspended sentence of three years' imprisonment, placed on probation for three years, and ordered to pay $540 in probation costs, $75 in court costs, and $200 in attorney's fees. Petitioner was sentenced on October 29, 1982, and absconded from supervision in March 1983. He was arrested for the probation violation in January 1987 in connection with his arrest on a new offense. Although a motion to revoke petitioner's probation was filed, that motion was dismissed after a friend of petitioner paid the probation costs. Third, petitioner was arrested in January 1988 for felony possession of marijuana and three traffic violations. The drug charge was dismissed, and petitioner was fined a total of $134 for the traffic violations and given credit for time served. Finally, petitioner was arrested on May 14, 1988, for possession of marijuana. That arrest arose after police responded to a report that an automobile theft was in progress and petitioner fled from the scene on foot. The marijuana possession was charged as a misdemeanor, and the attempted auto theft was not pursued. The charge was pending on the date of petitioner's sentencing in this case.

Although the presentence investigation report noted that the Sentencing Guideline applicable to petitioner's offense prescribed a term of imprisonment of two to eight months, the report recommended an upward departure from the guideline

sentence. Because of the seriousness of petitioner's criminal history, the report recommended a sentence of 18 months' imprisonment. Pet. App. 11A.

3. At the November 11, 1988, sentencing hearing, the district court imposed the 18-month sentence that had been recommended in the presentence investigation report. The court stated that it was departing from the sentencing guidelines because of petitioner's past history. Pet. App. 15B. After noting that petitioner was in danger of being treated by the State as an habitual offender if he were convicted again and that he needed counseling, the court stated that, id. at 16B:

> I want the record to show that I am departing because of the fact that although the particulars in this incident * * * are not aggravating * * * a look at [petitioner's] prior involvements and his prior convictions and his general demeanor and conduct certainly call for consideration by which he needs to conform his conduct to abide by law.

The court also stated that, id. at 17B:

> I don't agree with the guidelines because of their assessment of prior involvement in giving the points. By that standard, for example, a person could have ten convictions and they only give two or three points. I don't agree with that. You have got to look at each case separately.

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 10A-13A. The court found that, although the district court could have been more explicit about its reasons for departing from the guidelines, it was apparent from the record as a whole that the district court departed from the guidelines in accordance with the provisions of Sentencing Guideline § 4A1.3, which authorizes a departure if "the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." Pet. App. 11A-13A.

ARGUMENT

Two days after this case was decided by the Fifth Circuit, that court decided United States v. Lopez, 871 F.2d 513 (1989). In Lopez, the Fifth Circuit held that in determining whether to depart from the Sentencing Guidelines because the defendant's criminal history score does not adequately reflect the serious-

ness of his past criminal conduct or the likelihood that he will commit further crimes, the district court must determine the appropriate sentence by reference to the applicable sentencing guideline range for the most nearly analogous criminal history category. Petitioner notes (Pet. 6-8) that the district court did not make such a determination on the record in this case. The district court's departure from the procedure subsequently required by the court of appeals in Lopez did not prejudice petitioner, however, because it is clear that the district court would have imposed the same sentence if the court had followed the Lopez procedures.

Under Sentencing Guideline § 4A1.3, the district court may depart from the guidelines "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." The commentary to Section 4A1.3 states (Sentencing Guidelines 4.9):

> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly underrepresents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history.

Thus, as the Fifth Circuit stated in United States v. Lopez, supra, the Sentencing Commission contemplated that in imposing sentence in a case in which the criminal history category inadequately reflects the seriousness of a defendant's criminal history or his likelihood of recidivism, the district court should select the most nearly applicable criminal history category and employ the sentencing range that applies to that category rather than simply impose a sentence above the otherwise applicable range. See United States v. Cervantes, No. 89-1002

(2d Cir. June 14, 1989); United States v. Miller, 874 F.2d 466, 471 (7th Cir. 1989).

Nevertheless, a remand for further findings is not required in this case. Where the record reflects that the sentence imposed clearly falls within the appropriate range, no remand has been ordered even where the district court did not expressly consult the criminal history category that most closely resembles that of the defendant. See, e.g., United States v. Sturgis, 869 F.2d 54, 57 (2d Cir. 1989); United States v. DeLuna-Trujillo, 868 F.2d 122 (5th Cir. 1989). Compare United States v. Cervantes, supra; United States v. Burch, 873 F.2d 765 (5th Cir. 1989); United States v. Lopez, supra; United States v. Miller, supra (remand where result "may turn out to be about the same"). [1]

The record in this case makes it clear that the district court would impose the same sentence on remand that it imposed in the first instance. The record shows that the court considered as grounds for departure elements of petitioner's criminal history that support the imposition of an 18-month term of imprisonment. As the court of appeals explained, Pet. App. 11A:

> Under the sentencing guidelines, [petitioner] was assessed criminal history points for his previous conviction on a 1986 weapons charge, and his conviction in 1988 for burglary of a vehicle. No points were assessed for his 1982 conviction for the unauthorized use of a motor vehicle, for which he received a three-year suspended sentence, or for his 1982 conviction for theft, for which he was fined, because both offenses occurred when he was less than eighteen years old (seventeen) and more than five years before the incident giving rise to the federal charge. See Sentencing Guidelines § 4A1.2(d)(2). [Petitioner] also had a state charge of marijuana possession pending at the time of the federal offense.

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[1] To the extent that petitioner complains that the decision below conflicts with the Fifth Circuit's subsequent decision in United States v. Lopez, supra, he relies on an intra-circuit conflict, which does not call for review by this Court. See Wisniewski v. United States, 353 U.S. 901 (1957). Petitioner could have sought rehearing by the panel or rehearing en banc by the full Fifth Circuit, but he did neither. Moreover, the unpublished decision below has no precedential value within the Fifth Circuit, see Fifth Circuit Local Rule 47.5, as the court below recognized, see Pet. App. 10 n.* (quoting Fifth Circuit Local Rule 47.5).

If the two 1982 offenses had been committed when petitioner was 18 rather than 17 or if petitioner had received even a brief prison term for those crimes, he would have received at least 1 point for each offense under Sentencing Guideline § 4A1.1. If the motion to revoke petitioner's probation for absconding from supervision had not been dismissed when someone else paid petitioner's probation costs, the 1982 vehicle offense would have resulted in 3 points toward petitioner's criminal history score, rather than 1 point or none. Sentencing Guidelines §§ 4A1.1(a) and 4A1.2(k). If petitioner had been sentenced for the 1988 burglary of a vehicle two weeks earlier than he was, he would have received 2 additional points for the instant offense, since his assault offense would have been committed after his sentencing for the burglary. Sentencing Guidelines § 4A1.1(d). [2] Furthermore, petitioner had a separate marijuana possession charge pending at the time of sentencing, which would have warranted an addition of at least 1 point. Finally, the instant offense was committed less than two years after petitioner was released from custody on the 1986 weapons charge. Thus, if the 1986 sentence had been 60 days' imprisonment instead of 30, petitioner's criminal history score would have been increased by 2 points. Sentencing Guideline § 4A1.1. In sum, the record supports a departure from the applicable guideline by employing a Category VI criminal history score, because petitioner's criminal history is closely analogous to that of a defendant whose criminal history score under Section 4A1.1 is at least 9 points higher than petitioner's.

Apart from the departure based on the most closely analogous criminal history, petitioner's sentence could have been increased on account of the marijuana importation that was part of the same course of conduct as the assault on the Customs Officer.

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[2] Departure under such circumstances is expressly authorized by Sentencing Guideline § 4A1.3(d) and (e). See United States v. Sturgis, 869 F.2d at 57 (sentence in range that would have applied if the defendant had been convicted of pending charges before rather than after sentencing on instant offense "not unreasonable under the particular circumstances").

Sentencing Guidelines §§ 1B1.3(a) and 2D1.1. Moreover, the district court would have been justified in departing upward in sentencing because petitioner's criminal history reflected repeated instances of similar conduct involving drugs and flight from law enforcement officers. The guidelines do not weigh the fact that a defendant's prior criminal conduct reflects a similar pattern; departure is therefore permissible in such cases, particularly when similar conduct occurs at increasingly frequent intervals, as in this case. See United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989); United States v. Fisher, 868 F.2d 128 (5th Cir. 1989); United States v. DeLuna-Trujillo, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

EDWARD S.G. DENNIS, JR.
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Attorney

AUGUST 1989

(4)

SUPREME COURT OF THE UNITED STATES

CARLOS A. TAYLOR *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88–7503. Decided October 10, 1989

The petition for a writ of certiorari is denied.

JUSTICE STEVENS, respecting the denial of the petition for writ of certiorari.

The question presented by this certiorari petition is whether a district court may disregard the Sentencing Guidelines after finding that a defendant's criminal history score inadequately accounts for past conduct when the court could instead adjust for the inadequacy by increasing the criminal history category one or more levels. In *United States* v. *Lopez*, 871 F. 2d 513 (CA5 1989), a panel of the Court of Appeals for the Fifth Circuit characterized this issue as "a significant question concerning the appropriateness of departure from the Guidelines," *id.*, at 514, and answered it in the negative. Two days earlier, however, in petitioner's case a different panel of the same court had given a different answer to that question. Petitioner's panel disposed of his case pursuant to Fifth Circuit Rule 47.5, which permits the Court of Appeals to leave unpublished those "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law." There is thus a conflict within the Fifth Circuit on both the answer and the importance of the question petitioner presents to us.

Because the petition does not identify any *inter-Circuit* conflict concerning the question presented, and because the answer provided by the Fifth Circuit's published opinion is widely supported, the Court's denial of certiorari today is entirely consistent with rules governing the management of our

certiorari docket.* It is unfortunate that the summary disposition of petitioner's case by the Fifth Circuit and this Court may require petitioner to serve an 18-month prison sentence when the Guidelines would specify a range between only 9 and 15 months even if petitioner's criminal history category were increased two full levels. That, however, is the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in each case. Perhaps it is not too late for the Court of Appeals to exercise additional care in the administration of justice in this case.

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*Other Circuits have reached the conclusion endorsed by the *Lopez* panel. See *United States* v. *Jackson*, —— F. 2d ——, —— (CA11 1989); *United States* v. *Cervantes*, 878 F. 2d 50, 53 (CA2 1989); *United States* v. *Miller*, 874 F. 2d 466, 470–71 (CA7 1989). See also *United States* v. *Joan*, 883 F. 2d 491, —— (CA6 1989) (incrementally increasing offense level to account for inadequate criminal history when the defendant's criminal history score already placed him in the highest criminal history category).